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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ELIZABETH MONTIEL, an individual,

Plaintiff,

vs.

CRESCENT ELECTRIC SUPPLY COMPANY, a
corporation; and DOES 1 through 25, inclusive,

Defendants.

) Case Number: 08cv243 DMS

) **NOTICE OF MOTION AND MOTION TO
DISMISS WITHOUT PREJUDICE**

) Date: May 2, 2008

) Time: 1:30 p.m.

) Courtroom: 10

TO: DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on Friday, May 2, 2008, at 1:30 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at United States District Court, 940 Front Street, San Diego, CA 92101, Courtroom 10, in the courtroom of the Honorable Judge Dana M. Sabraw, Plaintiff Elizabeth Montiel will and hereby does move the Court for Dismissal Without Prejudice. This motion is brought on the following grounds:

The Fair Employment and Housing Act (hereinafter "FEHA") includes California Government Code section 12945, which authorizes qualified employees disabled by pregnancy to take a pregnancy disability leave of up to four months. Cal. Gov. Code, § 12945. FEHA also includes California Government Code section 12945.2, which authorizes qualified employees to take an additional California Family Rights Act (hereinafter "CFRA") leave of up to 12 weeks to care for the birth of a child. Cal.

Gov. Code, § 12945.2. California courts “are required to give great weight” to the Fair Employment and Housing Commission’s (the administrative agency charged with interpreting the FEHA) “interpretation of its own regulations and the statutes under which it operates.” Bradley v. Department of Corrections & Rehabilitation, 158 Cal.App.4th 1612, 1625 (2008).

California Code of Regulations, title 2, section 7297.7 (hereinafter “section 7297.7”) provides that it shall be an unlawful employment practice for “any person” to retaliate against an employee because of her exercise of her right to take CFRA leave. California Code of Regulations, title 2, section 7297.0 (hereinafter “section 7297.0”) provides the definitions that apply to section 7297.7. Although “person” is not expressly defined, section 7297.0 further provides that the “definitions in the federal regulations issued January 6, 1995 (29 CFR Part 825)...shall also apply to” section 7297.7. The Code of Federal Regulations, title 29, section 825.800, defines “[p]erson” as “an individual....” for purposes of Code of Federal Regulations, title 29, Part 825. Thus, section 7297.7 provides that it shall be an unlawful employment practice for any individual to retaliate against an employee because of her exercise of her right to take CFRA leave.

PLAINTIFF alleges in her complaint that on or about October 12, 2006, PLAINTIFF was disabled by pregnancy and was on pregnancy disability leave. (See Complaint, ¶ 10 attached as Exhibit “A” to Declaration of Christopher B. DeSaulniers in Support of Plaintiff’s Motion to Dismiss Without Prejudice.) PLAINTIFF subsequently started her statutorily authorized leave under CFRA. (See Complaint, ¶¶ 28-29.) Mr. Jeffrey J. Hoyt, who was PLAINTIFF’s supervisor and Branch Manager of DEFENDANT’s Vista, California location, falsely told PLAINTIFF that he would take steps to provide her with additional leave and subsequently falsely stated that PLAINTIFF’s position with DEFENDANT was secure. (See Complaint, ¶¶ 14 and 21.) PLAINTIFF will allege that she relied on these false assurances to her detriment. In spite of these assurances, PLAINTIFF was terminated from her position with DEFENDANT prior to the expiration of her statutorily authorized leave. (Complaint, ¶ 24.)

Consequently, Plaintiff will allege in a newly-filed complaint in state court that Mr. Hoyt retaliated against her by the above-described conduct because she took leave under the CFRA. The retaliation by Mr. Hoyt for PLAINTIFF’s exercise of her CFRA rights also included (1) failing to engage in the interactive process in good faith to determine if a reasonable accommodation existed which would

1 have allowed PLAINTIFF to continue her employment, and (2) failing to provide a reasonable
2 accommodation, both of which are required by California law. For these reasons, PLAINTIFF is seeking
3 to dismiss this case in order to subsequently file a case in Superior Court of California, San Diego
4 County naming Mr. Hoyt as an additional defendant.

5 Based on PLAINTIFF's knowledge and belief, Mr. Hoyt is domiciled in and is a citizen of
6 California. Because PLAINTIFF is also domiciled in California and is a citizen of California, by adding
7 Mr. Hoyt as a defendant, Federal courts would no longer have diversity jurisdiction. Accordingly,
8 dismissal without prejudice will allow PLAINTIFF to refile this case in California Superior Court.

9 This motion is based on this Notice of Motion and Motion, the Memorandum of Points and
10 Authorities filed herewith, the Declaration of Christopher B. DeSaulniers, the pleadings and papers on
11 file herein, and upon such other matters as may be presented to the Court at the time of the hearing.

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13 DATED: March 5, 2008

Respectfully submitted,

14 LAW FIRM OF ZAMPI AND ASSOCIATES

15
16 By: Gerald B. Determan
17 GERALD B. DETERMAN

18 By: Christopher B. DeSaulniers
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